Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et al.*, *Appellants*,

vs.

UNITED STATES OF AMERICA, *et al.*, *Appellees*.

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

REPLY BRIEF

WILLIAM T. JOHNSON
180 East Broad Street
Columbus, Ohio 43215
Attorney for Appellants

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Pursuant to Rule 16 of the Rules of this Court, Appellants respectfully submit this Brief Contra the Appellee's Motion to Affirm.

STATEMENT

The Motion to Affirm prepared by Appellees and served on Appellants on November 14, 1975 fails to refute significant legal questions and issues raised by Appellants in the Jurisdictional Statement. Appellees apparently concede that this Court has jurisdiction to review this case under 28 U.S.C. 1253, that Appellants have properly raised substantial federal questions, and that the statement of the case and summary of this litigation presented by Appellants were fairly stated in the Jurisdictional Statement.

Appellees wish this Court to ignore that the District Court below erred in granting summary judgment where there were genuine issues of fact in dispute (in fact, one Judge below stated that the only evidence which would shed light on the relative cost to the Medicare system of independent vis-a-vis in-house therapy services was supplied by the Plaintiffs.) (J. S. App. 13a). The decision of the District Court below urged as correct by the Appellees, with the authority of affirmance by this Court, would constitute a landmark holding of catastrophic proportions upon the scope of the Fifth Amendment, and would create substantial harm to the delivery of health care to the indigent and elderly in America. Appellants urge that the consequences, both in Ohio and throughout the United States, of the District Court decision clearly deserves plenary consideration by this Court, because the decision of the District Court would establish the following constitutional propositions:

1. That the right to be free from congressionally created classifications admittedly providing for arbitrary and discriminatory treatment within the same classifications, which discrimination is claimed to be justified solely for "cost control" and or "prevention of program abuse", is not protected by the Fifth Amendment. To conceive of the Fifth Amendment in these terms, Appellants contend, is no less than to hold that means are protected while the major end for which these protected means exist is not protected. This view reduces the Fifth Amendment to absurdity.

2. That Congress can enact legislation which may destroy or eliminate the practice of a chosen profession without showing a rational relationship to a legitimate governmental interest. This proposition would amount to a major retreat and limitation on cases previously decided by this Court holding to the contrary.

ARGUMENT

I. The discriminatory scheme called "salary equivalency" cannot be justified on the grounds, as Appellees would have it, that the Fifth Amendment allows Congress broad latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury.

The majority opinion of the District Court, together with Appellee's Motion to Affirm, have given the misleading impression that Appellants are requesting the Court to "speculate about the possible success or failure of the statute involved in achieving its claimed goal". Such is by no means the case. This appeal is not brought lightly, but out of a deep conviction of the importance of the issues involved. The questions presented are too significant to be decided on the merits by summary affirmance of the District Court decision without argument, because of the weight of authority accorded an affirmance.

It can require no argument to support the assertion that reducing the cost of a social insurance program and preventing abuse of the program are legitimate governmental objectives. However, the means employed to accomplish the objectives above must be reasonable and rationally related to the objectives. For example, when the government, in an attempt to reduce costs in the Medicare system, enacted legislation to prohibit proprietary home health agencies from contracting to provide physical therapy services to other providers under the Medicare program, the District and Appellate Courts presented with the above facts ruled that the mere assertion of "cost control" and "prevention of abuse" cannot justify such arbitrary and capricious discrimination. The Courts found that there was not a reasonable

basis or a rational relationship to a legitimate governmental interest between the legislation and the objective claimed.

In *Physical Therapy Services Rehabilitation Agency v. Weinburger,* U. S. District Court, District of Columbia, Civil No. 74-897 (decided July 18, 1975), the District Court, based on the identical facts of the above example, held that the above legislation was capricious and arbitrary in that it discriminates for no sufficient reason between public and non-profit suppliers of physical therapy services, and draws irrational distinctions between the providers of services. The Court rejected the assertion of the government that the discrimination was justified to assure quality of service and to control costs in the Medicare program.

In *American Medical Association v. Weinburger,* Civil No. 73-C-1653 (D.C. Ill. N.D., decided May 8, 1975) [Affirmed, U. S. Court of Appeals, Seventh Circuit, July 22, 1975] the District Court granted plaintiffs injunctive relief from the implementation of a law that was claimed to be justified by the Department of Health, Education and Welfare as necessary to promote cost savings and the prevention of over utilization of health services. The Court expressed, as did Judge Duncan in the instant case, that there were serious questions of whether the regulations were reasonably related to the purposes of the enabling legislation under which they were promulgated. The Court further decided that despite the asserted cost savings purpose of the legislation, the larger purpose of the Medicare program, i.e. the enabling legislation, is the delivery of medical services to those otherwise unable to obtain them. The Court concluded that the implementation of the scheme proposed by the government would not be considered reasonable nor rationally

related to the enabling legislation of the program.

Most significantly, as a direct result of the decisions of the District and Appellate Courts in the above-cited cases, the Department of Health, Education and Welfare quickly decided not to implement the provisions which were rejected by the Courts rather than appeal to this Court. Since the above-cited cases and the Department of Health, Education and Welfare actions were decided and taken subsequent to the instant appeal, appellants submit that plenary consideration would appear to be amply warranted.

In *Bay Ridge Diagnostic Laboratory, Inc. v. Dumpson,* U. S. District Court, Eastern District of New York, No. 75-C-640 (decided August 14, 1975), the State of New York, in a cost-saving measure, proposed to grant exclusive contracts for laboratory services to one laboratory for each of the city's boroughs. The plaintiffs, seven clinical laboratories, brought an action to enjoin this measure because they would be forced out of business. The Department of Health, Education and Welfare entered its appearance as amicus and urged in opposition to New York's measure that despite the cost saving purpose, the measure violated Medicaid law and would thwart the purpose of the Medicaid program. Unless Appellees are urging this Court to apply a standard of judicial scrutiny to cases involving state cost saving measures in the Medicaid program differently than that applicable to those proposed by the federal government in the Medicare program, it should be unquestioned that its position in the instant case cannot be sustained on the slender thread of "reducing costs."

II. Appellees urge this Court to approve of a discriminatory and arbitrary price-fixing scheme for independent physical therapists in violation of the express provisions of the Medicare Act.

Appellees contend (M.A. 7-8) that the statute involved merely prescribes the method of calculating the reasonable cost of physical therapy services for purposes of reimbursement from public funds. Apparently Appellees ignore or are unaware that the "method" has been implemented fixing a different and specific dollar amount in each state for what providers will be paid for an hour of an independent physical therapist's service. Recent decisions of this Court concerning the anti-competitive nature of direct or indirect professional price-fixing in the legal professions, and anti-trust efforts by the Justice Department against the medical profession for price-fixing raises great doubt on this prescribed "method" urged by the Appellees herein.

Appellees fail to point out that despite the fact that all providers under Medicare are subject to the same limitation based upon the reasonable cost for such services, the statute involved herein, in addition to said limitation, only fixes the reimbursement for compensation of independent physical therapists. Thus, there are now two standards to determine the reasonable cost for the same service. The provider will continue to be reimbursed fully for the compensation of the salaried therapist for performing the same service even though said salary is higher than the amount "fixed" for the independent therapist. By no stretch of the imagination or logic can Appellees justify this as "cost control." This is clearly an arbitrary and capricious treatment within the same classification without any rational basis. The

record below does not have even an allegation that the independent therapists were more inefficient, costly or were abusive of the Medicare program. In fact, the record supports the contrary position.

The price fixing scheme urged for affirmance by Appellees still ignore that a section of the Medicare Act specifically prohibits the implementation of such a scheme. Appellants didn't invent Section 1801 of the Medicare Act which prohibits any federal officer or employee from exercising any supervision or control over the compensation of any officer or employee of any institution, agency or person providing health services. This section was enacted as a safeguard to prevent the type of far-reaching and capricious scheme devised herein.

CONCLUSION

For the foregoing reasons, the Supreme Court should note probable jurisdiction and grant Appellants an opportunity to obtain judicial redress.

Respectfully submitted,

WILLIAM T. JOHNSON
180 East Broad Street
Columbus, Ohio 43215
Telephone (614) 464-0651
Attorney for Apellants

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